



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 30 OF 2019**

**KENYA UNION OF DOMESTIC,**

**HOTELS EDUCATIONAL INSTITUTIONS**

**AND HOSPITAL WORKERS.....CLAIMANT**

**- VERSUS -**

**M/S HAJJI GARAD ISSA.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 5<sup>th</sup> November, 2021)**

**JUDGMENT**

The claimants filed the memorandum of claim on 31.05.2019 through Hexron Onwongá the Industrial Relations Officer for the respondent. The claimant filed the suit alleging unfair summary dismissal of its member Mary Ndinda Mulwa (the grievant) and the refusal to pay terminal dues and underpayment per prevailing wages orders. The claimant pleaded as follows:

- 1) The respondent employed the grievant on 15.05.2014 as a domestic worker at Kshs. 6,000.00. She was terminated on 20.03.2016 without a valid reason having served for one year 10 months. At termination the claimant earned Kshs. 10, 000.00 per month.
- 2) The grievant reported the dispute to the claimant but the respondent failed to cooperate to resolve the dispute. A trade dispute was filed per section 62 of the Labour Relations Act, 2007 and the Cabinet Secretary appointed the conciliator, one Kimeli Koech. The respondent failed to appear and a certificate of unresolved dispute issued.
- 3) The claimant claimed for:
  - a) Notice pay Kshs. 12, 597.00.
  - b) Underpayment June 2014 – April 2015 Kshs. 13, 717.00.
  - c) Unpaid leave May 2015 – February 2016 Kshs. 25, 970.00.
  - d) Service pay for a year Kshs. 6, 300.00.
  - e) Annual leave one year 10 months Kshs. 17, 220.00.
  - f) 12 months' compensation at Kshs. 12, 597.00 p.m Kshs. 151, 164.00.
  - g) Total claim 226, 968.00.
  - h) A declaration the termination was unlawful and illegal.
  - i) Issue a certificate of service
  - j) Interest at Court rates from the date of termination.

k) Costs of the suit.

The respondent did not enter appearance or file a defence but was served mention notices and hearing notice.

The claimant testified that the respondent employed her on 15.05.2014 as a house-help at Kshs. 6000.00 per month which was the pay throughout her service. She pleaded that her last pay was Kshs.10, 000.00 per month. In view of the evidence that contradicts the pleadings, while the Court finds that there might have existed employment relationship, it is difficult for the Court to ascertain the terms of the contract and the last monthly pay.

While pleading that she was terminated on 20.03.2016 without a valid reason and due process, the grievant did not in her testimony, state the date of the termination. She did not plead the details of the circumstances of the termination but testified that she was sick and was given permission to go to hospital. The relevant hospital records are not exhibited. The claimant further testified, **“.... I was given permission to go to hospital. I came back about 5.00pm. I was locked out by watchman. Boss came. He was with the cousin. The cousin told me that the Boss did not want to speak to me and I had been terminated. I packed my belongings. Second day I reported to the union...”** The Court finds that there was no sufficient evidence to establish the date of the termination. Further the grievant testified that it was the cousin to the Boss who told her that she had been terminated. Such hearsay evidence fell short of the necessary balance of probability that the respondent terminated the claimant. The Court finds that the grievant was also casual on the particulars of the dismissal in the manner the claimant pleaded about the termination and equally casual on the testimony which did not identify the respondent but referred to watchman, Boss and cousin of the Boss without exactness on the role of the respondent. The Court finds that there was no evidence to establish the date and circumstances of the alleged dismissal.

There was no pleading that the grievant was a member of the claimant trade union and there was no evidence of such membership. The Court finds that the suit purportedly by way of reference to the Court under the provisions of the Labour Relations Act, 2007 was an abuse of Court process as there appears not to have existed a valid trade dispute subject of the statutory conciliation process as was invoked in this case.

The record does not show that the respondent was served the memorandum of claim and summons and the Court finds that the suit suffered an irreparable irregularity that acts as an impetus to dismissal of the suit.

In view of the findings the suit will fail as the claimant has failed to establish the justification for grant of any of the remedies as claimed and prayed for.

The respondent did not participate and the claimant will bear own costs of the suit.

In conclusion the memorandum of claim is hereby dismissed with orders the claimant to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 5<sup>TH</sup> NOVEMBER, 2021.**

**BYRAM ONGAYA**

**JUDGE**